IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-241

COMMUNICATIONS WORKERS OF AMERICA

*Petitioner,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
JAMES D. HODGSON, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
UNITED STATES OF AMERICA
TELEPHONE COORDINATING COUNCIL,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
ALLIANCE OF INDEPENDENT TELEPHONE UNIONS
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

*Respondents,*

## SUPPLEMENTAL MEMORANDUM OF PETITIONER COMMUNICATIONS WORKERS OF AMERICA

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The supplemental brief of IBEW petitioners in companion petition No. 77-242, called the attention of this Court to the recent decisions of the United States Court of Appeals for the Fifth Circuit in *Weber* v. *Kaiser Aluminum and Chemical Corporation*, 563 F. 2d 216 (November 17, 1977) and *United States* v. *East Texas Motor Freight System, Inc.*, 564 F. 2d 179 (December 5, 1977), and suggested a confiict between the Third and Fifth Circuits on the questions of

(a) limitation of relief under Title VII of the Civil Rights Act of 1964, as amended, to identifiable victims of discrimination; and

(b) the extent to which the scope of relief available under Executive Order 11246 is limited by Title VII.



The supplemental memorandum for the Federal Respondents, recognizing the devastating effect of *Weber* and *ETMF* upon the government position, attempts to distinguish these cases on their facts. The distinction is only surface and illusory, a distinction without a difference. The Federal Respondents also attempt to distinguish *Southbridge Plastics Division, W. R. Grace and Co.* v. *Local 759, URW*, 565 F. 2d 913 (Fifth Circuit, January 9, 1978) on the grounds that the impact of the present Consent Decree (to which Union Intervenors *were not* parties) upon the AT&T employers' contractual promotion and transfer systems (to which Union Intervenors *are* parties) was so "limited" as to be consistent with this Court's ruling in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324. Each of these government contentions must be answered in turn.

1. The Fifth Circuit in *Weber* interprets this Court's decision in *Franks* v. *Bowman Transpcrtation Co.*, 424 U.S. 747, as adopting the "rightful place" doctrine developed in that circuit as the proper method of attaining the "make-whole" objectives of Title VII. It reasons quite logically that

> "Quotas imposed to achieve the 'make-whole objective of Title VII rest on a presumption of some prior discrimination. There can be no basis for prefering minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the employment scheme. . .
>
> "(U)nless a preference is enacted to restore employees to their rightful places within a particular employment scheme it is strictly forbidden by Title VII."

Finding that there had been no showing of prior discrimination by Kaiser, the Court concluded there was no justification for *remedial* relief, and that quotas merely to attain racial balance in the work force are unlawful.

The government parties argue that since, in this case, discrimination by the employer was alleged by the government plaintiffs, and although denied by the employer, was not contested for purposes for this decree, the uncontested existence of *some* discrimination distinguishes this case from *Weber*, in which there was *no* discrimination, and makes *Weber* inap-

plicable. The government parties apparently are contending that the existence of *some* discrimination by an employer validates all quota relief, both remedial and sociological.

As pointed out in CWA's Petition for Writ of Certiorari, (p. 6, 7) the Consent Decree in this case has two aspects:

(a) Section IIIA provides relief to a class of identifiable victims, namely, female employees who were denied the opportunity to apply for hire or transfer to craft jobs. The relief is remedial, providing for waiver of the "best qualified" contractual criterion, competition of the basis of seniority, adjustment of wage progress scales and damages (albeit inadequate) in lieu of back pay.

(b) The balance of the decree, including the model affirmative action plan, dictates racial, sexual and ethnic preferences to attain racial, sexual and ethnic balance within the workforce without regard to prior discriminatory treatment toward the favored employees.

In approving this Consent Decree the Third Circuit also relied on *Franks* v. *Bowman Transportation Company* as supporting its interpretation of Title VII. (JA 14a-16a) In short, the Third Circuit reads *Franks* as permitting relief to victims and non-victims alike upon a showing of *some* discrimination toward *some* employees. The Fifth Circuit in *Weber* reads *Franks* as limiting relief under Title VII to those measures necessary to "make whole" the *injured* employees by restoring them to their "rightful place" in the workforce and that any other relief is "strictly forbidden" (*supra*). This conflict between circuits must be resolved, and the law in this area clarified for the benefit of employers, employees and government agencies alike, by the grant of *certiorari.*

2. The Union intervenors argued in the District Court and the Court of Appeals, as they do in this Court, (see, e.g. CWA Petition for Certiorari, P. 12-15) that the Consent Decree exceeds the scope of relief available under Executive Order 11246 and its implementing regulation, Revised Order 4. Both the District Court (JA 95a-97a) and the Third Circuit (JA 16a-17a) rejected that argument on the authority of the Third Circuit's decision in *Contractors Association of Eastern Pennsylvania* v.



*Secretary of Labor*, 442 F. 2d 159 (1971). cert. den. 404 U.S. 854:

> "Moreover, the (Union) contention ignores the fact that in this case the United States sued to enforce Executive Order No. 11246. In *Contractors Assn. of Eastern Pa.* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), we held that the Executive Order was a valid effort by the government to assume utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII, *Certainly that broader governmental interest is sufficient in itself to justify relief directed at classes rather than individual victims of discrimination.*" (JA 17a, emphasis added)

The italicised portion of the above quotation is in direct conflict with the subsequent holding of the Fifth Circuit in *East Texas Motor Freight, supra:*

> "The plaintiffs argue that the obligations on government contractors under the Executive Order are 'above and beyond' those imposed on employers by Title VII because the Executive Order contains no provision similar to Section 703(h) of Title VII (Supplemental Brief, p. 11). This is an argument never made until after the Teamsters decision.
>
> "The argument cannot be accepted because Congress has declared for a policy that a bona fide seniority system shall be lawful. The Executive may not, in definance of such policy, make unlawful—or penalize—a bona fide seniority system. *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 587-589, 72 S. Ct. 863, 96 L. Ed. 1153 (1952). This Court, in the recent *Nopsi* decision (above cited), recognized that an order of the Executive has the force of law only 'if it is not in conflict with an express statutory provision' (553 F. 2d at 465, 14 FEP Cases at 1739). Section 703(h) of Title VII is such a provision. The authorities cited by plaintiffs, to whatever extent applicable, are before the Teamsters decision and are made obsolete by that decision. . .
>
> "Moreover, the Supreme Court in *Teamsters* (97 S. Ct. at 1869, 14 FEP Cases at 1531) emphasized earlier decisions that Title VII courts had been given broad equitable powers

so as to enable them to give the 'most complete relief possible'. In this contest, relief was limited to identified individual victims for whom the necessary showing could be made. If such relief is the 'most complete . . . possible', the Executive Order could scarcely be interpreted to demand more."

This appears to mean that since this Court's decision in *Teamsters, Contractors Association* is no longer good law, at least in the opinion of the Fifth Circuit. This present case was decided by the Third Circuit before the *Teamsters* decision was handed down, but a request for stay pending petition of writ of *certiorari*, based on the *Teamsters* and *United Air Lines*, 431 U.S. 553, decisions, was subsequently denied.

The original Third Circuit decision in *Contractors Association* held that Sections 703(a), (h) and (j) of Title VII were not limitations upon any remedy other than Title VII, particularly remedial relief under Executive Order 11246, which was a voluntary arrangement with prospective government contractors and a proper exercise of the government's power to contract. The Fifth Circuit in *Weber*, citing the principle that "executive orders may not override contradictory congressional expressions," conditioned E.O. 11246 relief upon a finding of prior discriminatory practices. Citing Section 703(d), the Court said:

> "If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination*, the executive order must fall before this direct congressional prohibition." (Emphasis in original)

As noted above, the same Court, relying upon this Court's decision in *Teamsters*, limited remedial relief under E.O. 11246 to identifiable victims of discrimination.

This Court has never addressed the question of the scope of relief available under E.O. 11246. Granting *certiorari* in this case will give the Court the opportunity to resolve this conflict between circuits.

3. In *Southbridge Plastics, supra*, the Fifth Circuit was confronted with a situation almost identical to the present case.



The EEOC and the employer entered into a conciliation agreement establishing sexual quotas for layoffs, thus overriding a collectively bargained contract provision for layoff on the basis of seniority. The Union, which was not a party to the conciliation agreement, sought to attack it through arbitration. The employer sought a judicial declaration of its validity. Instead, the Fifth Circuit set it aside, saying:

> "In short, *Teamsters* taken together with *Gilman* and *Stevenson* (*Myers* v. *Gilman Paper Co.*, 544 F. 2d 837 (5th Cir. 1977)), (*Stevenson* v. *International Paper Co.*, 516 F. 2d 103, (5th Cir. 1975)) indicate clearly that the conciliation agreement between the Company and the EEOC cannot stand. That is, Gilman and Stevenson hold that terms and conditions of employment, such as seniority, which are agreed to by management and union, can be overturned on a Title VII challenge only to the limited extent necessary to comply with that statute. *Teamsters* hold that absent a showing of discriminatory purpose in a seniority system, that system is protected by §703(h) from attack on other Title VII grounds. In this case, there was no showing of any discriminatory purpose inherent in the seniority system. Accordingly, wholesale destruction of this system, as authorized by the conciliation agreement, cannot be permitted.
>
> "Of course, a determination that the seniority system, itself, cannot be overturned does not preclude, upon the proof of certain facts, an individual female employee being placed in a higher seniority level than her length of employment, otherwise would allow. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 7474, 96 S. Ct. 1251, 47 L. Ed. 2d 444, 12 FEP Cases 549 (1976), the Supreme Court held that §703(h) does not prevent awarding a victim of post Act discrimination a 'position in the seniority system that would have been his had he been hired at the time of his application'. 424 U.S. at 765-66, 96 S. Ct. at 1265, 12 FEP Cases at 556. In Teamsters, the Court articulated the standards of proof necessary to trigger the *Franks'* slotting remedy. In the main, these standards require an individual who seeks slotting in a higher seniority bracket to prove that he or she would have applied earlier for a job with the company had it not been for

> the latter's discriminatory practices and the alleged discrimination victim's consequent unwillingness to engage in a 'futile gesture'. 431 U.S. at 363, 97 S. Ct. at 1871, 52 L. Ed. 2d at 436, 14 FEP Cases at 1531. . .
>
> "Finally, having determined that the Company and EEOC have not shown the seniority system to violate Title VII, that system, as part of a binding agreement between the Company and the Union, must control here. . ."

The only differences between *Southbridge Plastics* and the present case are —

(a) Layoff was involved instead of promotion; and

(b) The contractual system was based on seniority alone, not a combination of merit and seniority.

Certainly what the Fifth Circuit considered "wholesale destruction" of the contractual system in *Southbridge Plastics* was no more severe than the effect upon the AT&T system, i.e. substitution of "basic qualifications" for "best qualified" in the merit promotion plan, and override of seniority altogether in favor of race, sex or national origin until quotas are filled. Use of the override in 28,856 hires and promotions in one year, 25.6% of all such actions, in lieu of the contractual criteria, (JA 198a) is considered by the Unions to be "wholesale destruction" of their contractual systems.

In any event, the Fifth Circuit seems to be using the expression "wholesale destruction of this system" as an apposite to what follows, i.e. personalized relief to individual victims upon a proper showing, which it approves under the criteria of *Franks* and *Teamsters*.

Again, the Third Circuit has blessed what the Fifth Circuit has condemned, upon substantially identical facts. This Court must grant *certiorari* to resolve the conflict and announce the law.

Respectively submitted,

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